

**TAXATION LAW SECTION**  
Respectfully submits the following position on:

\*  
**HB 4412**

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The Taxation Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Taxation Law Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Taxation Law Section is 1,222.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 14. The number who voted in favor to this position was 11. The number who voted opposed to this position was 0. The number who abstained from voting was 2.

**Report on Public Policy Position****Name of section:**

Taxation Section

**Contact person:**

Jackie J. Cook

**E-Mail:**[Jackie.cook@cmsenergy.com](mailto:Jackie.cook@cmsenergy.com)**Bill Number:**

HB 4412 (Iden) Property tax; tax tribunal; tribunal procedures; revise, and provide other general amendments. Amends secs. 3, 21, 22, 25, 26, 32, 34, 35a, 49, 51 & 62 of 1973 PA 186 (MCL 205.703 et seq.) & repeals sec. 23 of 1973 PA 186 (MCL 205.723).

**Date position was adopted:**

April 28, 2017

**Process used to take the ideological position:**

Position adopted after an electronic discussion and vote.

**Number of members in the decision-making body:**

14

**Number who voted in favor and opposed to the position:**

11 Voted for position

0 Voted against position

2 Abstained from vote

1 Did not vote (absent)

**Position:**

Support

**Explanation of the position, including any recommended amendments:**

On November 3, 2016, the Taxation Section adopted by Resolution a Policy Statement on Michigan Tax Tribunal Reform which states that the Section “supports legislation that improves the Michigan Tax Tribunal’s process to promote the fair and just administration of state and local tax assessments.”

House Bill 4412, introduced earlier this year, would implement comprehensive reform of the Tax Tribunal. An ad hoc committee, appointed at a Taxation Section Council meeting by the Chair, Alex Domenicucci, reviewed HB 4412 and determined that HB 4412 is aligned with the Section’s policy statement. Notable changes in HB 4412 that seek to improve Tax Tribunal administration include:

- Raising the salary of Tax Tribunal members (judges) to the salary level of administrative law managers.
- Allowing part-time members.
- Allowing temporary member appointments, if needed.
- Requiring the Governor to seek a list of qualified member candidates from professional associations in the state.
- Aligning restrictions/rules on members' activities outside of the Tax Tribunal with those placed on state court judges.
- Permitting the Tax Tribunal to operate out of state regional offices.
- Expanding the scope of promulgated rules the Tax Tribunal may propose to include ones on mediation, ethical standards and training for members, and docket maintenance.
- Extending the time for filing a non-property tax petition from 35 to 90 days.
- Requiring petition signers to certify the petition is grounded in fact and filed in good faith.
- Requiring the state to appropriate funds to the MTT sufficient to maintain its operation in accordance with the MTT Act.
- Requiring members to issue opinions within 120 days of hearings or post-hearing briefs being filed.
- Raising the limit for filing in the small claims division, rather than the entire tribunal, to \$100,000 for non-prop cases and allowing property cases to be filed in the small claims division with the acquiescence of the opposing party when the taxable value or SEV amount at issue is \$100,000-\$250,000.

The ad hoc committee recommended that Council take a formal position in favor of HB 4412. Council then voted electronically in favor of supporting HB 4412.

**The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.**

<http://legislature.mi.gov/doc.aspx?2017-HB-4412>

**FOR LEGISLATIVE ISSUES ONLY:**

**This position falls within the following Keller-permissible category:**

- The regulation and discipline of attorneys
- ✓ The improvement of the functioning of the courts
- The availability of legal services to society
- The regulation of attorney trust accounts
- The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

## **Taxation Section Public Policy Statement on Michigan Tax Tribunal Reform**

The Taxation Section of the State Bar of Michigan supports legislation that improves the Michigan Tax Tribunal's process to promote the fair and just administration of state and local tax assessments.

### **A. Authority**

This statement addresses improvement of the functioning of the Michigan Tax Tribunal, a governmental body that adjudicates tax controversies. The subject matter of this statement, although not falling within the letter of Section (B) of Supreme Court Administrative Order 2004-1, falls within its apparent intent.

This statement also falls within a portion of the Taxation Section's Purpose Statement set forth in Article I, Section 2 of its bylaws that appears consistent with the scope of SCAO 2004-1(B):

#### **SECTION 2.**

The purposes of this Section shall be to study the laws and procedures pertaining to the law of taxation and to promote the fair and just administration of local, state, and federal tax laws; to study and report upon proposed, necessary, or desirable legislation; to promote throughout the State of Michigan the legal education of members of the bar and the public on the subject of taxation by sponsoring meetings, institutes, and conferences; to promote the Section through outreach programs.

### **B. About the Taxation Section**

The Taxation Section, a recognized section of the State Bar of Michigan with over 1,300 members, is the leading organization of legal tax professionals in the State of Michigan. The Taxation Section is comprised of lawyers of diverse backgrounds that include attorneys in private law firms, corporations, nonprofit organizations, and governmental agencies, along with judges, legislators, law students and law professors. Members of the Taxation Section represent individual taxpayers, property owners, large and small businesses across a wide range of industries, as well as government and nonprofit organizations.

As the preeminent association of legal tax professionals in this state, the Taxation Section has a significant interest in encouraging the uniform and equitable enforcement of tax laws, and reducing the cost and burden of tax administration and compliance to the benefit of taxpayers and government. The Taxation Section is committed to maintaining a system that works — one that builds upon the principle of voluntary compliance, is consistent with sound tax policy, is easy to administer, and is efficient.

### **C. Michigan's Tax Forums**

In Michigan, a taxpayer may appeal state tax issues to one of two forums without prepaying the disputed liability: the Michigan Court of Claims or the Michigan Tax Tribunal. On the other hand, a taxpayer may only appeal a property tax assessment to the Michigan Tax Tribunal (although the Michigan State Tax Commission has jurisdiction over some property tax issues).

For state tax disputes, when choosing a forum, a taxpayer may consider a number of factors, such as (1) the size and nature of the taxes in dispute, (2) perceptions regarding the nature of the Tax Tribunal as an

administrative hearing body that is effectively a part of the executive branch rather than a court of the judicial branch, (3) perceptions regarding the nature of the Court of Claims which operates as any other Michigan circuit court although it is assigned to the Michigan Court of Appeals, (4) the fact that Court of Claims' judges are attorneys while not all Michigan Tax Tribunal members are attorneys, and (5) the fact that non-lawyers may represent taxpayers before the Tax Tribunal.

#### **D. Background and Need**

The Taxation Section's most recent efforts for state tax litigation reform consisted of two main objectives: 1) strengthening the Michigan Tax Tribunal as a true tax court; and 2) eliminating "pay to play" as a threshold to jurisdiction in the Court of Claims. While the second goal has been accomplished through Public Act 79 of 2015, the first goal is yet to be resolved.

The Tribunal has exclusive jurisdiction over property tax disputes and will always have a central role in their adjudication. These disputes are critical to taxpayers and state and local governments. Indeed, while there are some state tax disputes on the Tribunal's docket, the majority of cases resolved by the Tax Tribunal are property tax disputes. And, unlike the Court of Claims, the Michigan Tax Tribunal is a true "specialty" body composed of members with tax expertise. Due to these characteristics, the Tribunal is considered to be both indispensable and uniquely qualified to fulfill a central role in the resolution of tax issues.

However, budgetary, personnel and procedural issues hobble the Michigan Tax Tribunal and leave its future in question. Accordingly, while the Section has achieved one of its two overarching goals a strong Michigan Tax Tribunal is still needed for efficient tax administration in Michigan. Without strengthening the Tribunal, tax litigation reform cannot be fully achieved.

#### **E. Characteristics to Preserve and Enhance**

##### ***1. Independence:***

The most important attribute of a tax tribunal is its independence. An impartial process for resolving tax disputes is a hallmark of both equitable tax administration and a competitive business environment. This perception of fairness contributes to better relationships between taxpayers and tax administrators, as taxpayers would know that disagreements with state auditors may be brought before an independent third-party. Similarly, state tax administrators would be unlikely to make arbitrary assessments knowing they could be reviewed in an impartial forum.

Independence is fostered through: (1) a more robust and accountable vetting and selection process of qualified candidates for appointment to the Tax Tribunal, (2) ensuring greater integrity in the assignment and adjudication of assigned cases, and (3) ethical practices and standards, such as the Code of Judicial Conduct.

##### ***2. Expertise:***

Judges who sit on the Tax Tribunal should not only be independent; they should have significant experience in state tax law. Introducing an independent adjudicative procedure staffed by tax professionals with technical expertise to review matters before they reach the Court of Appeals ensures

both legally consistent and well-analyzed decisions and contributes to the development of a robust record essential for subsequent appeals.

Originally, the Tax Tribunal<sup>1</sup> was envisioned to be a single tax tribunal of tax specialists. Like an appellate court, they would hear each case "en banc," hence, the "entire tribunal" division.<sup>2</sup> With the "en banc" concept, composition of the tribunal began with a statutory limit on the number of attorney appointments and statutory requirements for an assessor, an accountant, and an appraiser, and two "at Large" members— members with any or no tax professional background. The rationale for this structure had been that the courts of general jurisdiction lacked tax expertise and would issue conflicting decisions without providing meaningful guidance to litigants.<sup>3</sup>

While conceptually the Tax Tribunal's "en banc" model attempted to bring the perspective of every tax profession to every significant tribunal matter, the persistent need to staff and process cases led the Tax Tribunal to move away from this model as a general rule and now instead generally assigns a single tribunal judge to conduct the trial and make a record in each case.<sup>4</sup>

Given that (1) the Tax Tribunal moved away from an "en banc" model, (2) that many cases may not require the tax expertise of a non-lawyer, and (3) the Tax Tribunal is the only a quasi-judicial adjudicative body that counts non-attorneys among its members, perhaps a continued adherence to such a multi-discipline panel is no longer necessary.<sup>5</sup>

In large part, individuals possessing the requisite expertise should be identified through an enhanced vetting and selection process that could be further ensured through such reforms as (1) increasing the number of sitting judges who are members of the Bar, (2) increasing the level of compensation of tribunal judges, and (3) requiring formal continuing professional education of judges.<sup>6</sup>

### 3. Accountability and Consistency:

Although the Tax Tribunal has in recent years adopted standards for timely issuing orders and decisions, it has no ethical rules as a reference for its members. It is largely not subject to public review or a system of public accountability.

Further, the Tax Tribunal has struggled and continues to struggle with operational consistency. The Tax Tribunal is governed by its own particular set of rules<sup>7</sup> which are augmented by a general rule set forth in the Michigan Administrative Hearing System<sup>8</sup> which ultimately looks to the Michigan Court Rules.<sup>9</sup> For

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<sup>1</sup> Public Act 186 of 1973, as amended.

<sup>2</sup> The Tax Tribunal Act was modeled after a report issued by Professor L. Hart Wright in 1969, which called for each case to be heard "en banc." L. Hart Wright, *Proposed Final Report to the Advisory Board Michigan Tax Procedure Project* (1969). This practice ended in 1991. Jack L. Van Coevering, *The Model State Tax Tribunal Act: Measuring Fairness and Efficiency in Michigan's State Tax Appeal System*, Vol XXXVI, Issue 1 MI Tax L. 21 (2010).

<sup>3</sup> See *Wright, supra* at note 2.

<sup>4</sup> See *Van Coevering, supra* at note 2.

<sup>5</sup> An earlier committee empaneled by then-State Treasurer Doug Roberts made the same recommendation. See Lawrence W. Morgan, Francis Moss and Howard Ledbetter, *Michigan Tax Tribunal Committee Report* (1991).

<sup>6</sup> All of these recommendations appeared in *Morgan, Moss and Ledbetter, supra* at note 5.

<sup>7</sup> MAC R792.10201 – R792.10289.

<sup>8</sup> MAC R792.10101 – R792.10137.

<sup>9</sup> MAC R792.10102(3).

some litigants, efforts to follow this labyrinth of procedures and those ultimately utilized by Michigan courts can be a challenge.

Unlike courts, however, the Tax Tribunal has a greater need for uniform application of those rules because the Tax Tribunal relies on non-lawyers (Tax Tribunal members and staff) to process and render decisions. So instead of addressing substantive issues, the Tax Tribunal must direct non-lawyers, including the parties' non-lawyer representatives, as to how the rules should be applied. Providing access to a static set of rules and operating procedures would allow the Tax Tribunal to operate more efficiently. A static set of rules and operating procedures would also promote consistency and transparency.

#### *4. Access:*

Unlike the Court of Claims, the Tax Tribunal's filing fees are a barrier to filing a case that is largely imposed on taxpayers. Because the Tribunal is funded with filing fee revenue, its fee structure largely falls on taxpayers, who must pay for filing the appeal petition and any subsequent motions to amend the petition. The fees could be substantial, with the minimum filing fee at \$250 and the maximum at \$2,000. The filing fees at the Court of Claims and any circuit court are only \$175.<sup>10</sup> Unlike the Court of Claims, the Tax Tribunal lacks funding support from the State. The need to continually raise fees to meet budget demands might result in some taxpayers not being able to have their day in court.

### **F. Supported Improvements**

#### *1. Budgetary reform:*

Currently, the Tax Tribunal's entire budget is fee-based, and budgetary shortfalls exert pressure to increase fees. The Tax Tribunal's fees are already among the highest for comparable forums nationwide. Despite the high fees, the Tax Tribunal's operations result in a large annual operating deficit over which the Department of Licensing and Regulatory Affairs has little control and reluctantly absorbs out of its own budget. The Section supports placing the Tax Tribunal on the general fund budget and appropriations process to ensure that it has the resources it needs to operate effectively. All costs of achieving legislative mandates should come out of the general fund. Fees should be decoupled from costs and should not be looked to as a source of funding for operations. Fee revenues should not be a factor in the appropriations process.

#### *2. Constituency reform:*

Currently, the Tax Tribunal must have at least two attorneys, one certified public accountant, one certified assessor and one professional real estate appraiser.<sup>11</sup> Additional members who do or do not fit these categories are permitted, but not required,<sup>12</sup> and the Tax Tribunal's budget has not permitted any such additional members.<sup>13</sup> The Section recognizes the original intent of creating a forum accessible to non-attorney representatives, as well as the critically relevant expertise individuals from these non-

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<sup>10</sup> Mich. Comp. Laws 600.2529; MCL 600.1986.

<sup>11</sup> Mich. Comp. Laws 205.721; Mich. Comp. Laws 205.722(1).

<sup>12</sup> Mich. Comp. Laws 205.722(1).

<sup>13</sup> The Tribunal currently has five members – the Chair, two attorney members, an assessor member and an appraiser member.

attorney professions are qualified to contribute. Nonetheless, the Tax Tribunal conducts evidentiary hearings and engages in statutory construction, and experienced attorneys are centrally critical to this work. The Section supports increasing the required number of attorney members and also supports the right of any litigant (in anything other than a small claims matter) to have an attorney member preside over the dispute.

*3. Reforms to attract and retain qualified candidates:*

At current compensation levels, staff salaries have increased above the salaries of members, and members' salaries are not high enough to attract and retain many qualified candidates. The Section recommends compensating members at a rate equivalent to a Circuit Court judge. The Section also recommends the development of additional rules to support judicial independence, to provide for professional development in the adjudication of cases and in substantive and procedural tax issues and to permit members to engage in outside employment as permitted by the Michigan Code of Judicial Conduct.

*4. Appointment process (vetting and transparency) reforms:*

The Section recommends adoption of transparent procedures for identification and selection of candidates in which statewide professional associations work with the Department of Treasury the Department of Attorney General, the State Tax Commission and the Governor's Office to develop procedures for identification of candidates who meet threshold experience criteria and are considered eminently qualified to serve as adjudicators. The procedures must ensure transparency to the fullest extent permitted by law to instill public confidence.

*5. Assignment reform:*

The Section recommends that case assignments be made by lot pursuant to Michigan Court Rule 8.111 to the fullest extent possible. However, the Section would also recommend that the Tax Tribunal be given the latitude to adopt an alternative assignment system if it removes discretion from the assignment process, is transparent and predictably random, better aligns the professional expertise of members with property tax and non-property tax cases, and follows the requirements of the Administrative Procedures Act (Act 306 of 1969) in its adoption.

**G. Prior Public Policy Statement on Michigan Tax Tribunal Reform**

The Taxation Section stands by all of the rationale set forth in the August 27, 2009 statement's "Reasons for Proposed Legislation" and we believe that this policy statement is largely consistent with the prior policy statement.